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ROBIN VAN BUERLE & ANOR

v.

LE REVE (MALAYSIA) SDN BHD

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COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
[CIVIL APPEAL NO: W-02-870-2008]

C

24 AUGUST 2011

EVIDENCE: *Adverse inference - Failure to call witness - Whether suppression or withholding of evidence shown - Whether s. 114(g) of the Evidence Act 1950 applicable - Evidence Act 1950, s. 114(g)*

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EVIDENCE: *Burden of proof - Allegation of particular fact - Appellants' sales agency agreement with company terminated for alleged breach of company's rules of conduct - Company issued appellants show-cause letter containing allegations of breach - Whether allegations investigated - Whether company had burden to prove appellants breached rules of conduct - Whether appellants' reply to show cause notice amounted to admission of allegations - Whether termination justified*

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The appellants husband and wife were appointed as sales agents by the respondent, a multi-level marketing (MLM) company, and were paid commissions whenever they or their down-lines sold the respondent's products. According to cl 13(b) of the agreement between the parties ('the agreement'), the respondent could forthwith terminate the agreement if a sales agent, *inter alia*, breached any provision of the agreement or the Code of Ethics or Rules of Conduct. Rule 3 of the Rules of Conduct ('r. 3') forbids sales agents who sold products other than those of the respondent's from inducing other sales agents whom they had not personally sponsored to sell such products. Based on allegations made by a third party against the appellants, the respondent issued the appellants a letter to show cause why the agreement should not be terminated as they had breached r. 3 by joining another MLM company and induced other sales agents and directors of the respondent to join them. The respondent did not investigate the truth of the allegations, nor was the third-party, who was the source of the allegations, called to testify at the trial. The appellants replied that the show cause letter was "unjustified

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and unwarranted" and pointed out that the "commendation and recognition" they had received in promoting the respondent's business in itself contradicted the allegations made. The appellants said they had "no explanation to offer as our performance is the strength of our case". Taking the appellants' reply as a refusal to answer the allegations made against them, the respondent terminated the agreement forthwith. The appellants sued the respondents for damages for breach of contract and sought loss of income at RM4,800 per month for ten years. The High Court dismissed their claim holding the respondent was justified in terminating the agreement for failure of the appellants to answer the allegations raised in the show-cause letter. It also held the appellants had waived their right to be heard. In their appeal to the Court of Appeal the appellants contended the High Court's decision was bad as (i) neither the allegations in the show-cause letter nor the assertion that the appellants had breached the agreement had been proven (ii) the *audi alteram partem* rule had been breached and (iii) the High Court failed to invoke adverse inference against the respondent for not calling to testify the third party upon whose information the respondent's allegations against the appellants was based.

Held (by majority, dismissing the appeal with costs)
Per Abu Samah Nordin JCA; Zaleha Zahari JCA concurring:

(1) The onus was on the appellants to establish their case on balance of probabilities, which they failed to discharge. At the trial, the appellants did not adduce evidence to show the allegations against them were untrue or that the termination was wrongful or unlawful. What they did was shift the onus onto the respondent to adduce evidence in support of its allegations. (paras 19 & 20).

(2) When the appellants replied "We have no explanation to offer", there was no necessity for the respondent to provide evidential proof of the allegations. The appellants by their own conduct had impliedly admitted to the allegations. (para 21)

(3) The opportunity given to the appellants to answer the allegations in the show-cause letter was to their advantage as the respondent elected not to issue outright a letter of termination which it was entitled to do under cl. 13(b) of the agreement. It was not prejudicial to the appellants nor did it occasion any miscarriage of justice. (para 27)

(4) The submission that the High Court erred in failing to invoke s. 114(g) of the Evidence Act 1950 against the respondent for not calling Chitra Mathews (the originator of the allegations) as a witness was without merit. The occasion to call her did not arise as the appellants elected not to offer any explanation to the show-cause letter. Section 114(g) was only applicable if it was shown there had been suppression or withholding of evidence. (para 28)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) Since the respondent unilaterally terminated the agreement, the legal burden was on them to justify the termination and prove the appellants had breached r. 3. It had to prove on balance of probabilities that the appellants had sold products other than those of the respondent's or that they had induced other sales agents to sell such products. The respondent failed to establish the appellants had breached r. 3 and failed to justify the unilateral termination of the agreement. (paras 51 & 70)

(2) The respondent had not pleaded the facts that constituted a breach of r. 3 by the appellants. Nowhere in the statement of defence was it pleaded the appellants sold products other than those of the respondent's or that they had induced other sales agents to sell such products. The respondent was therefore precluded from submitting the appellants had breached r. 3. (paras 53 & 57)

(3) The show-cause letter by itself could not be relied upon by the respondent as evidence to prove the appellants had breached r. 3. The letter was merely an allegation. Evidence of an allegation being made was not proof of the matter that was being alleged. (para 59)

(4) The appellant's reply to the show-cause letter was far from being an admission of the respondent's allegations. The words "We have no explanation to offer" could not be considered in isolation but be examined in its entirety, taking into account its tenor, which was an expression of anger and indignation to the respondent's allegations. (para 69)

(5) The plaintiffs were entitled to damages for loss of income at RM4,800 per month for three months, amounting to RM14,400. (para 80)

Bahasa Malaysia *Translation Of Headnotes*

Perayu-perayu suami isteri dilantik sebagai agen jualan oleh responden, sebuah syarikat jualan langsung ('MLM'), dan dibayar komisyen apabila mereka atau wakil mereka (down-lines) menjual produk responden. Menurut kl. 13(b) perjanjian di antara pihak-pihak ('perjanjian tersebut'), responden boleh menamatkan perjanjian tersebut dengan serta merta jika agen jualan, antara lain, memungkiri mana-mana peruntukan perjanjian atau Kod Etika atau Peraturan Tatasusila. Peraturan 3 Peraturan Tatasusila ('peraturan 3') melarang agen jualan yang menjual produk-produk selain daripada produk responden daripada menyebabkan agen jualan lain yang tidak ditaja oleh mereka secara peribadi untuk menjual produk-produk tersebut. Berdasarkan kepada dakwaan-dakwaan yang dibuat oleh pihak ketiga terhadap perayu-perayu, responden mengeluarkan kepada perayu-perayu suatu surat tunjuk sebab mengapa perjanjian tersebut tidak boleh dibatalkan kerana mereka telah memungkiri peraturan 3 dengan memasuki syarikat MLM yang lain dan menyebabkan agen-agen jualan lain dan pengarah-pengarah responden bergabung dengan mereka. Responden tidak menyiasat kebenaran dakwaan-dakwaan tersebut, dan pihak ketiga, yang merupakan sumber dakwaan-dakwaan tersebut, juga tidak dipanggil untuk memberikan keterangan semasa perbicaraan. Perayu-perayu membalas bahawa surat tunjuk sebab tersebut adalah "unjustified and unwarranted" dan menunjukkan bahawa "commendation and recognition" yang mereka terima dalam mempromosi perniagaan responden dengan sendirinya bercanggah dengan dakwaan-dakwaan yang dibuat. Perayu-perayu menyatakan bahawa mereka mempunyai "no explanation to offer as our performance is the strength of our case". Mengambil kira balasan perayu-perayu sebagai keengganan menjawab dakwaan-dakwaan terhadap mereka, responden membatalkan perjanjian tersebut dengan serta merta. Perayu-perayu menyaman responden bagi kemungkiran kontrak dan memohon kerugian pendapatan sebanyak RM4,800 sebulan bagi tempoh sepuluh tahun. Mahkamah Tinggi menolak tuntutan mereka, sekaligus memutuskan bahawa responden mempunyai asas dalam menamatkan perjanjian tersebut atas kegagalan perayu-perayu membalas dakwaan-dakwaan yang dibangkitkan di dalam surat tunjuk sebab. Ia juga memutuskan bahawa perayu-perayu telah melepaskan hak mereka untuk didengar. Di dalam rayuan mereka ke Mahkamah Rayuan, perayu-perayu menghujah bahawa keputusan Mahkamah Tinggi adalah

A salah kerana: (i) dakwaan-dakwaan di dalam surat tunjuk sebab dan pernyataan bahawa perayu-perayu telah memungkiri perjanjian tersebut tidak pernah dibuktikan; (ii) peraturan *audi alteram partem* telah dimungkiri; dan (iii) mahkamah gagal membangkitkan inferens bertentangan terhadap responden bagi kegagalan memanggil pihak
B ketiga memberi keterangan mengenai maklumat yang menjadi asas dakwaan-dakwaan responden terhadap perayu-perayu.

Diputuskan (secara majoriti, dan menolak rayuan dengan kos)

C **Oleh Abu Samah Nordin HMR; Zaleha Zahari HMR bersetuju:**

(1) Beban adalah atas perayu-perayu untuk membuktikan kes mereka atas imbangan kebarangkalian, yang gagal dilepaskan oleh mereka. Semasa perbicaraan, perayu-perayu tidak
D mengemukakan keterangan untuk menunjukkan dakwaan-dakwaan terhadap mereka adalah tidak benar atau bahawa penamatan tersebut adalah salah dan tidak sah. Apa yang dilakukan mereka adalah memindahkan beban ke atas responden untuk mengemukakan keterangan menyokong
E dakwaan-dakwaannya.

(2) Apabila perayu-perayu menjawab "We have no explanation to offer", tidak ada keperluan untuk reponden memberikan bukti keterangan terhadap dakwaan-dakwaan tersebut. Perayu-perayu
F melalui tindakan mereka sendiri telah secara tidak langsung mengakui dakwaan-dakwaan tersebut.

(3) Peluang yang diberikan kepada perayu-perayu untuk menjawab dakwaan-dakwaan di dalam surat tunjuk sebab adalah bagi
G kebaikan mereka kerana responden memilih untuk tidak mengeluarkan surat penamatan dengan serta merta walaupun mempunyai hak untuk berbuat demikian di bawah kl. 13 perjanjian tersebut. Ia tidak memprejudiskan perayu-perayu dan juga tidak menyebabkan salah laksana keadilan.

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(4) Hujahan bahawa Mahkamah Tinggi telah terkhilaf kerana gagal membangkitkan s. 114(g) Akta Keterangan 1950 terhadap responden atas kegagalan memanggil Chitra Mathews (orang yang memulakan dakwaan-dakwaan tersebut) sebagai saksi
I adalah tidak bermerit. Peluang untuk memanggilnya tidak timbul kerana perayu-perayu memilih untuk tidak menawarkan

apa-apa penjelasan kepada surat tunjuk sebab. Seksyen 114(g) hanya beraplikasi jika ditunjukkan bahawa terdapat sekatan atau penahanan keterangan.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Oleh sebab responden menamatkan perjanjian secara sebelah pihak, beban dari segi undang-undang adalah ke atas mereka untuk menjustifikasi penamatan dan membuktikan bahawa perayu-perayu telah memungkiri peraturan 3. Ia perlu membuktikan atas imbangan kebarangkalian bahawa perayu-perayu telah menjual produk-produk selain daripada kepunyaan responden atau bahawa mereka telah menyebabkan agen jualan lain untuk menjual produk tersebut. Responden telah gagal membuktikan bahawa perayu-perayu telah memungkiri peraturan 3 dan gagal untuk menjustifikasi penamatan perjanjian secara unilateral.

(2) Responden tidak memplidkan fakta-fakta yang membentuk kemungkiran peraturan 3 oleh perayu-perayu. Tidak diplidkan di mana-mana dalam penyata pembelaan bahawa perayu-perayu menjual produk-produk selain daripada kepunyaan responden atau bahawa mereka telah menyebabkan agen jualan lain menjual produk-produk tersebut. Responden oleh itu dihalang daripada menghujah bahawa perayu-perayu telah memungkiri peraturan 3.

(3) Surat tunjuk sebab dengan sendirinya tidak boleh disandarkan oleh responden sebagai keterangan untuk membuktikan perayu-perayu telah memungkiri peraturan 3. Surat tersebut adalah dakwaan semata-mata. Keterangan bahawa dakwaan dibuat bukan bukti perkara yang didakwa.

(4) Jawapan perayu kepada surat tunjuk sebab tidak boleh menjadi pengakuan dakwaan-dakwaan responden. Perkataan-perkataan "We have no explanation to offer" tidak boleh dipertimbangkan secara berasingan tetapi diperiksa secara keseluruhan, mengambil kira maksud, yang merupakan luahan perasaan marah terhadap dakwaan-dakwaan responden.

(5) Plaintif-plaintif berhak mendapat ganti rugi bagi kerugian pendapatan sebanyak RM4,800 sebulan untuk tiga bulan, berjumlah RM14,400.

A **Case(s) referred to:**

American International Assurance Company Ltd v. Koh Yen Bee [2002] 4 CLJ 49 ***(refd)***

Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

B *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2008] 4 CLJ 881 CA* ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)

C *For the appellants - T Ramalingam; M/s Ramalingan & Co*
For the respondent - Christopher Arun; M/s Zaid Ibrahim & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S7-22-55-2006]

Reported by Ashok Kumar

D

JUDGMENT

Abu Samah Nordin JCA:

E **[1]** This is a claim for damages for breach of contract. It was set in motion following the termination of the appellants (plaintiffs in the High Court below) as independent consultants with the respondent (defendant in the High Court) due to their failure to respond to the allegations set out in a show cause letter that they F had allegedly breached the terms of their appointment.

[2] Briefly the facts are as follows. The respondent is a multi-level marketing company ("MLM company") engaged in promoting and selling a range of perfume and fragrance and complementary G accessories ("the products"). The first appellant and the second appellant (husband and wife respectively) are commission agents who work as independent consultants in marketing and selling the respondent's products.

H **[3]** The first appellant was appointed as an independent consultant with the respondent pursuant to an agreement, known as Independent Consultant Agreement ("the Agreement") on 19 August 2000. It is not exactly clear how and when the second appellant became an independent consultant with the respondent I as there is no evidence of a separate written agreement between her and the respondent. According to the first appellant (SP1), the second appellant became an independent consultant based on

"the practice of the respondent that the spouses are automatic consultants together with the contracting spouse". This evidence is not challenged by the respondent.

[4] The working relationship between the appellants and the respondent are governed by the said agreement. As independent contractors, they are not employees of the respondent. Clause 6 of the Agreement states that an independent contractor is in the business for himself and as such is free to select his own means, method and manner of operation, and to choose the hours and locations in which he will conduct his activities as an independent consultant provided always that he acts in accordance with the Direct Sales Act and Regulations 1993 and all amendments, Code of Ethics, Rules of Conduct and all other terms and conditions contained within the Agreement.

[5] The Code of Ethics and the Rules of Conduct of an independent consultant are an integral part of the agreement. Paragraph 1 of the Code of Ethics states that an independent contractor shall uphold and follow the Code of Ethics and Rules of Conduct by observing not only the letter but also their spirit.

[6] Rule 3 of the Rules of Conduct specifically states:

> An independent consultant who personally sells products other than Le Reve products will not induce other Independent Consultants, whom he has not personally sponsored, to sell such products.

[7] As independent consultants, the appellants earn commission based on the purchase orders which they secured for the respondent, subject of course to the payment of the purchase price. The appellants are also paid bonuses and overrides based on sales of the respondent's products resulting from orders taken from other independent consultants, or by their recruits or recruits of their recruits and so on.

[8] Sometime in 2003 the respondent discovered that the appellants had also joined another MLM company and had approached other independent consultants whom they have not personally sponsored to join the other MLM company. The appellants conduct, if true, would be contrary to r. 3 of the Rules of Conduct.

[9] Pursuant thereto, the respondent issued a show cause letter dated 9 October 2003 to the appellants. The show cause letter reads:

> 9 October 2003
>
> Mr & Mrs Robin Van Buerle
> 205 Block 18
> Section 6
> 40000 Shah Alam
> Selangor
>
> Dear Robin & Gina
>
> It has been brought to our attention that you have joined another MLM company and that you are actively approaching Le Reve Consultants and Directors with a view to them joining you in this venture. This represents a serious betrayal of your leadership responsibilities as Le Reve Senior Directors and against the best interest of the Company.
>
> In view of the above, we propose to terminate your Agreement with Le Reve. However, we will provide the opportunity for you to show cause as to why your Agreement should not be terminated. This should be sent in writing marked 'confidential' to my personal attention, to be received within seven days of the date of this letter.
>
> If we do not hear from you, the termination will be automatic from that date.
>
> Yours sincerely,
>
> sgd.
>
> Phillip E Hobby
> Managing Director

[10] The respondent's right to terminate the agreement is expressly stated in cl. 13(b). It reads:

> The company has the right to terminate this agreement forthwith on written notice posted to the last known address of the Independent Consultant if the Independent Consultant fails to comply with the renewal qualification as set out in the 'Le Reve Reward Plan-Detailed' brochure or **breaches any of the provisions of this agreement or Code of Ethics or Rules of Conduct ...** (emphasis added)

[11] The appellants in their reply did not refute the specific allegations in the show cause letter. They regarded the show cause letter as "unjustified and unwarranted". Instead of replying to or denying the specific allegations therein, they responded to the show cause letter in the following tone:

> 13th October 2003
>
> Dear Mr. Phil Hobby,
>
> **Re: Notice of intention to terminate our contract**
>
> We refer to the above matter as contained in your letter to us dated October 9th 2003.
>
> The said notice was unjustified and unwarranted as the commendation and recognition of our contribution to the healthy promotion of Le Reve contradicts your allegations.
>
> We have no explanation to offer, as our performance is the strength of our case.
>
> Notwithstanding the motive behind the said notice, we wish to put you on notice that, any attempt on your part to jeopardize our livelihood, after we had spent much resources on developing the market with a view to enhancing our quality of life, as well as others who we have sponsored, will be met with a resort to legal redress.
>
> Kindly respond soonest to enable the Le Reve consultants and Directors to perform their function with peace of mind.
>
> Yours sincerely,
>
> sgd.
>
> Robin & Gina Van Buerle
> Independent Senior Directors
> Le Reve (M) Sdn Bhd.

[12] To state that the notice to show cause was "unjustified and unwarranted" or an intimation that they would seek legal redress if their livelihood is jeopardised certainly was not an answer to or denial of the specific allegations in the show cause letter. Sterling performance of the appellants is not the issue.

[13] The respondent viewed the appellants' letter as a plain refusal to answer the specific allegations against them. Thus, by letter dated 20 October 2003, the respondent exercised its right to terminate the agreement with the appellants. The letter of termination reads:

A 20 October 2003

Mr & Mrs Robin Van Buerle
205 Block 18
Section 6
40000 Shah Alam
B Selangor.

Dear Robin & Gina

I acknowledge receipt of your letter dated 13 October 2003.

C You have failed to comply with the contents of my letter of 9 October 2003 and I therefore advise that your Agreement with Le Reve is terminated with immediate effect.

Please contact Selina Seet to arrange for the immediate return of the Le Reve company car.

D

Yours sincerely

sgd.
Phillip E Hobby
Managing Director

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[14] The appellants reacted by filing a writ action against the respondent claiming damages for breach of contract. The basis of the appellants' action against the respondent is based entirely on one ground as pleaded in para. 9 of the statement of claim:

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> 9. Melalui satu surat bertarikh 09.10.2003, Defendan telah bertindak menamatkan perjanjian agensi mereka dengan Plaintif-Plaintif, atas dasar wasangka (allegation) bahawa Plaintif-Plaintif turut terlibat dalam sebuah syarikat jualan terus MLM yang lain di Malaysia.

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[15] In essence the appellants' pleaded case against the respondent is that the respondent terminated the agreement because they were involved in another MLM company. It is not based on the ground that the appellants had joined another MLM
H company and are actively approaching other consultants of the respondent to join the appellant in another MLM company, as alleged in the show cause letter.

[16] The respondent's defence is that the appellants had
I contravened the terms and conditions of the agreement and the Rules of Conduct, including among others, that an independent consultant shall not induce other independent consultants of the

respondent whom he has not personally sponsored, to sell products other than the respondent's products. The details of the alleged breach of the agreement are spelt out in the show cause letter.

[17] After a full trial, the High Court dismissed the appellants' claim for damages for breach of contract with costs. The learned judicial commissioner (JC) held that the respondent was justified in terminating the agreement pursuant to cl. 13(b) due to the appellants' failure to reply to the specific allegations in the show cause letter. He was of the opinion that by reason of their failure to reply to the specific allegations in the show cause letter, it was reasonable to conclude that the allegations were true. The learned JC also held that the appellants had waived their right to be heard, citing *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2008] 4 CLJ 881. Hence it was not necessary for the respondent to provide evidential proof of the allegations in the show cause letter.

[18] Being dissatisfied, the appellant appealed to this court. The main ground of appeal concerns the burden of proof. It was submitted that the learned JC erred in law and in fact in holding that the respondent was justified in terminating the agreement under cl. 13(b) without: (i) proof of the allegations and (ii) proof that it was the appellants who breached the terms of the agreement. The second ground of appeal was that the learned judge erred in law in holding that there was no breach of the *audi alteram partem* rule by relying on the Court of Appeal decision in *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2008] 4 CLJ 881 whereas in law the principle of natural justice, which is applicable to public bodies has no place in private law, which is purely contractual in nature. (See *American International Assurance Company Ltd v. Koh Ken Bee* [2002] 4 CLJ 49). The last ground of appeal was that the learned JC erred in failing to invoke s. 114(g) of the Evidence Act 1950 against the respondent for not calling Citra Mathews who provided the information which formed the basis of the respondent's allegations against the appellants. Those are the grounds referred to in the memorandum of appeal. Nothing turns on the issue of pleading or that the respondent had adduced evidence which was contrary to its pleading in the statement of defence.

[19] The aggrieved party before us is the appellants. The learned JC had dismissed their claim for damages for unlawful termination of the agreement. Clearly, the onus is on the appellants to establish their case on the balance of probabilities, which they had failed to discharge.

[20] At the trial, the first appellant (SP1) and the second appellant (SP2) did not adduce any evidence to show the allegations against them to be untrue or that the termination was wrongful or unlawful. What they did was to shift the onus on the respondent and let the respondent adduce evidence in support of its allegations.

[21] The agreement does not prohibit the appellants from joining another MLM company simpliciter. Rule 3 of the Rules of Conduct only prohibits the appellants from inducing other independent consultants of the respondent, whom they (appellants) have not personally sponsored, to sell third party's products. That is the crux of the allegations against the appellants. When the appellants replied that,

"We have no explanation to offer"

there was no necessity for the respondent to provide evidential proof of the said allegations. The appellants by their own conduct had impliedly admitted to the said allegations.

[22] Be that as it may, the respondent did call its Director and Chief Executive Officer of Le Reve Private Limited (SD1) and its General Manager (SD2) to verify the allegations in the show cause letter. The show cause letter and the termination letter were signed by SD1 himself. The show cause letter was based on information contained in a letter addressed to one Citra Mathews, a field officer of the respondent who was based in New Zealand and unable to testify as she has a permanent job in New Zealand. The letter was written by one Harold. Both Citra Mathews and Harold were not called as witnesses.

[23] In cross-examination, SD1 was asked:

> How much investigation did you do to confirm Citra Mathews's testimony?

SD1 replied:

> The 1st thing that I do was send a letter to the Plaintiff to give them the opportunity to say it is true or not true. If they had said it is not true, then I would have investigated further, my culture is that when you have a problem you also go directly to the other party not behind their back fishing the evidence before speaking with them directly. When given the opportunity to deny the allegation, the Plaintiff expressly refuse to deny that in writing.

[24] The respondent is not obliged to provide evidential proof of the allegations in the show cause letter by reason of the appellants not denying or refuting them.

[25] SD2 is a close friend of the appellants. He confirmed that he and his wife were invited by the appellants to join another MLM company ie, Jupiter Oil about two or three months prior to their termination as independent consultants but he abstained from informing the respondent for fear that it may jeopardise the appellants' livelihood. At the trial SD2 did however testify for the respondent.

[26] During cross-examination, SD2 was asked:

> What was your reaction to the first Plaintiff's invitation to join Jupiter Oil?

He replied:

> I was actually very disheartened with the Plaintiff. At that time, he was my up line in the Defendant's business and a leader of the team I was in, and we all looked up to him for guidance and motivation. He had always, from time to time, advised the team members to focus our time, energy and efforts to develop our businesses selling the Defendant's products and not to get involved in other businesses as that would affect our integrity with the clients. So, when I saw that he, as our leader, did not practice what he preached, I was very disappointed and demoralized.

[27] It is apparent from the judgment of the learned JC that the main reason he dismissed the appellants' action was due to their failure to establish that the respondent had unlawfully terminated the agreement. He held that the onus was on the appellants, and not on the respondent. He held that the appellants' failure to answer the specific allegations against them led to the reasonable

belief that the allegations were true. The reference to *Yusof Sudin v. Suruhanjaya Perkhidmatan Awam & Anor, supra,* was made in the light of the show cause letter which accorded the appellants the opportunity to answer the allegations therein. The opportunity given to the appellants was in fact to their own advantage as the respondent elected not to issue outright a letter of termination, which it was entitled to, under cl. 13(b) of the agreement. It was not prejudicial to the appellants nor did it occasion any miscarriage of justice.

[28] The submission that the learned JC erred in failing to invoke s. 114(g) of the Evidence Act 1950 against the respondent for not calling Citra Mathews as a witness is without any merit. SD1 spoke to Citra Mathews to verify the allegations before issuing the show cause letter. On the facts of the instant appeal, it was not necessary to call her. The occasion to call her had not arisen as the appellants elected not to offer any explanation to the show cause letter. Section 114(g) is only applicable if it can be shown that there has been suppression or withholding of evidence. Mohd Azmi SCJ in *Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 aptly explained the scope of s. 114(g) thus:

> It is essential to appreciate the scope of section 114(g) lest it be carried too far outside its limit. Adverse inference can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in possession, or for non-production of not just any witness but an important and material witness to the case.

[29] For the aforesaid reasons, I dismissed the appeal with costs. As liability had not been proven against the respondent, the issue on damages for breach of contract is rendered irrelevant.

[30] My learned sister, Zaleha Zahari JCA has seen this judgment in draft and has expressed her agreement with it.

Hishamudin Mohd Yunus JCA (dissenting):

[31] This is an appeal against the decision of the High Court of Kuala Lumpur. On 15 June 2009 the High Court of Kuala Lumpur had dismissed the plaintiffs' claim against the defendant for damages for breach of contract.

[32] The appellants had appealed to this court (Court of Appeal) against that decision.

[33] I am allowing this appeal with costs. I now give my grounds for my decision. A

[34] In this judgment I shall be referring to the appellants as the 'plaintiffs' and the respondent as the 'defendant'.

[35] The first and second plaintiffs are husband and wife, respectively. B

[36] The defendant is a multilevel marketing (MLM) company. It is in the business of selling perfumes and body care products through MLM. It sells its perfumery and body care products (collectively shall be referred to as 'the products') through a networks of sales agents who it prefers to call 'Independent Consultants'. C

[37] On 19 August 2000 the defendant and the plaintiffs entered into a MLM agency agreement called the 'Independent Consultant Agreement' ('the agreement'). Under the agreement, the defendant appointed the plaintiffs as its sales agents or 'Independent Consultants'. As Independent Consultants, the plaintiffs were to sell the defendant's products. As Independent Consultants, the plaintiffs were not employees of the defendant and were not paid salaries. They were mere sales agents and they earned through commissions that the defendant paid them. The plaintiffs were paid commissions whenever they or their down-lines sold the defendant's products. D E F

[38] Within seven months of their appointments as Independent Consultants, the plaintiffs were promoted to become Directors of the defendant company.

[39] On 1 August 2001 both the plaintiffs were promoted to become Senior Directors. G

[40] As Senior Directors the plaintiffs earned higher commissions, and hence they earned more income. In addition, they were given a fully-maintained Proton Wira car. H

[41] However, on 20 October 2003 the defendant unilaterally terminated the Agreement resulting in the termination of the plaintiffs' appointments as Independent Consultants.

[42] Aggrieved by the termination, the plaintiffs filed an action against the defendant for breach of contract, that is to say, for breach of the agreement. I

[43] The High Court dismissed their claim. Hence, the present appeal before us.

[44] The agreement gives the defendant the right to terminate the agreement in two ways, the manner of termination being governed by cl. 13(b) and 13(c) of the agreement.

[45] Clause 13(b) states:

> The Company has the right to terminate this agreement forthwith on written notice posted to the last known address of the Independent Consultant if the Independent Consultant fails to comply with the renewal qualification as set out in the 'Le Reve Reward Plan – Detailed' brochure or breaches any of the provisions of this agreement or the Code of Ethics or Rules of Conduct (or any new editions which the Company may from time to time introduce).

[46] Clause 13(c) provides:

> The Company has the right to terminate this agreement at any time for any reason on giving one month's notice to the Independent Consultant in writing posted as aforesaid.

[47] In the present case, in terminating the agreement with the plaintiffs, the defendant chose to invoke its right of termination pursuant to cl. 13(b).

[48] The plaintiffs protested on the grounds that they have not breached either the agreement or the Code of Ethics or the Rules of Conduct.

[49] The defendant contends that the plaintiffs had breached r. 3 of the Rules of Conduct for the Le Reve Independent Consultants ('Rules of Conduct').

[50] Rule 3 of the Rules Of Conduct provides:

> Rule 3. An Independent Consultant who personally sells products other than Le Reve products will not induce other Independent Consultants, whom he has not personally sponsored, to sell such products.

[51] In my judgment, in the present case, since it is common ground that it was the defendant that unilaterally terminated the agreement, therefore, the legal burden is on the defendant to justify the termination. This means that the legal burden is on the

defendant to prove that the plaintiffs had breached r. 3 of the said Rules of Conduct. It must prove on a balance of probabilities that the plaintiffs had sold products other than Le Reve products ('other products'); or that they had induced other Independent Consultants to sell such other products. There must be evidence of the breach, that is to say, evidence of the sale or evidence of the inducement.

[52] But before adducing evidence of the sale or of the inducement, it must be pleaded in the statement of defence that the plaintiffs had sold other products or had induced other Independent Consultants to sell such other products.

[53] In the present case, however, upon examining the statement of defence, I note that the defendant has not pleaded the facts that constituted a breach of r. 3 by the plaintiffs. Nowhere in the statement of defence is it pleaded that the plaintiffs had sold products other than Le Reve products. Or, nowhere in the statement of defence is it pleaded that the plaintiffs had induced other Independent Consultants to sell such other products.

[54] The defendant places much reliance on para. 12 of the statement of defence. But no relevant facts are pleaded in this paragraph. In this para. 12, the defendant merely refers to its show cause letter of 9 October 2003 issued to the plaintiffs, but does not state what the allegation was in the show cause letter. This paragraph is vague and it merely states:

> ... for breach of the terms and conditions of the Independent Consultant Agreement and the Rules of Conduct of the Defendant.

[55] Such a pleading as this is meaningless.

[56] This being the case, therefore, the defendant has failed to even plead in what manner the plaintiffs had breached r. 3, let alone proving the breach.

[57] The defendant in its submission, however, contends that the breach by the plaintiffs of r. 3 is in the form of inducing other Independent Consultants to sell other products (that is not Le Reve products). But this manner of breaching the rule is not pleaded in the statement of defence. With respect, since the manner of the breach has not been pleaded, the defendant therefore is precluded from making such a submission.

[58] But the defendant, in evidence and in its submission, also relies on the content of the show-cause letter, although the content of the letter, as I have said earlier, is not pleaded. Nevertheless, for the sake of dealing with the defendant's argument, I shall refer to the content of that letter. The show-cause letter reads:

> 9 October 2003
>
> Mr & Mrs Robin Van Buerle
> 205 Block 18
> Section 6
> 40000 Shah Alam
> Selangor
>
> Dear Robin & Gina
>
> It has been brought to our attention that you have joined another MLM company and that you are actively approaching Le Reve Consultants and Directors with a view to them joining you in this venture. This represents a serious betrayal of your leadership responsibilities as Le Reve Senior Directors and against the best interest of the Company.
>
> In view of the above, we propose to terminate your Agreement with Le Reve. However, we will provide the opportunity for you to show cause as to why your Agreement should not be terminated. This should be sent in writing marked 'confidential' to my personal attention, to be received within seven days of the date of this letter. If we do not hear from you, the termination will be automatic from that date.
>
> Yours sincerely
>
> Sgd.
> Phillip E Hobby
> Managing Director

[59] Now, putting aside the issue of pleading for a moment, on the issue of evidence, this show-cause letter by itself cannot be relied upon by the defendant as evidence to prove that the plaintiffs had sold other products, or had induced other Independent Consultants to sell other products. In other words, the show-cause letter cannot be relied upon by the defendant to prove that the plaintiffs had breached r. 3. This show-cause letter is merely an allegation. Evidence of an allegation being made is not proof of the matter that is being alleged in the allegation.

[60] In attempting to prove that the plaintiffs had induced other Independent Consultants to sell other products, the defendant had relied on the evidence of a witness, namely, Mr. Lee Hock Lai (DW2), who at the time when he testified was the General Manager of the defendant company. He said in evidence that he and his wife, who was also an Independent Consultant of the defendant company, were approached by the first plaintiff to join a company called Jupiter Oil; and that this incident happened about two or three months prior to the termination of the agreement by the defendant. DW2 said that Jupiter Oil was also in the direct selling business, the selling of engine oil. But when pressed by the plaintiffs' counsel during cross-examination, DW2 conceded that he was not sure of the name of the company. Significantly, DW2 told the court that he did not inform this incident to the defendant because he and his wife and the plaintiffs were close friends and he did not want to jeopardise the plaintiffs' livelihood. DW2 also said in evidence that he and his wife were not involved in the termination of the agreement.

[61] It is clear that this Jupiter Oil incident as related by DW2 to the court during the trial was not the basis for the issuance of the notice to the show-cause letter. This means that this incident as related by DW2 to the court was not the basis of the termination of the agreement by the defendant. In other words, DW2's evidence about the Jupiter Oil incident is irrelevant.

[62] If the Jupiter Oil incident as related by DW2 was not the basis of the termination of the agreement, then, what is the basis of the defendant's action against the plaintiffs? In other words, what was it that moved the defendant to issue the show-cause letter to the plaintiffs? The answer appears to be found in the evidence of the defendant's first witness Phillip Hobby (DW1) a director of the defendant company, who was also the Chief Executive Officer of the Australian company Le Reve Private Limited. He said in his witness statement that the show-cause letter was issued based on a letter dated 6 October 2003 brought to his attention by one Harold. The letter was not addressed to DW1 but to the said Harold. However, he did not say who this Harold was and neither was this Harold called as witness. This letter (that was addressed to Harold) was written by one Chitra Mathews.

[63] In relation to the said Chitra and her letter, DW1, in cross-examination, said in evidence:

Q: You are alleging the Plaintiff, what is your allegation?

A: That they have joint another MLM company, approached Le Reve people to join that company.

Q: What was the basis of this, the evidence you rely to allege.

A: The evidence was testimony Chitra, to the effect the allegation happened.

[64] It is significant to note that this particular person, Chitra Mathews, was never called as a witness, and that in her letter she was merely reporting what other Independent Consultants had told her about the first plaintiff, Robin Van Buerle. These other Independent Consultants were also not called as witnesses by the defendant. In other words, Chitra's letter only contains heresay information.

[65] DW1, however, conceded that what are contained in Chitra's letter are mere allegations and that he did not carry out any investigation to verify the truth of the allegations. Instead, DW1 appears to have his own peculiar manner of approaching the problem. He said:

Q: How much investigation did you do to confirm Chitra Mathews' testimony?

A. The 1st thing I did was send a letter to the Plaintiffs to give them the opportunity to say it is true or not. If they had said it is not true, then I would have investigated further. My culture is that when you have a problem you also go directly to the other party not behind their back fishing the evidence before speaking with them directly. When given the opportunity to deny the allegation, the Plaintiff expressly refuse to deny that in writing.

...

Q: What kind of evidence did she give you to support her testimony?

A: As I mentioned yesterday, the letter from Chitra was an allegation, a serious allegation. I choose to respond to that allegation direct to the Plaintiff as a priority choice instead of first gathering evidence behind his back. I then gave him the opportunity to respond to that allegation and his response was that he could not defend the allegation.

Q: What you mean is you did not have evidence, only an allegation.

A: Yes.

[66] Although, as has been said earlier, Chitra's letter was the basis for the show-cause letter, however, upon examining the defendant's submission, in attempting to justify its action in terminating the agreement with the plaintiffs, the defendant does not appear to place much reliance on the said Chitra Mathews' letter. The defendant was relying on the evidence of DW2 to justify the termination. But as I have said earlier, DW2's evidence is irrelevant as the defendant company was never made aware of the 'Jupiter Oil incident' at the time it terminated the agreement, because DW2 did not inform the defendant of the incident because of his close friendship with the plaintiffs. The decision to terminate was based solely on Chitra's letter, the show-cause letter, and the plaintiffs' response to the show-cause letter. According to the defendant the plaintiffs' response to the show-cause letter was that 'he could not defend the allegation'.

[67] This brings me to the next issue. The plaintiffs in response to the defendant's show-cause letter wrote:

13th October 2003

Dear Mr. Phil Hobby,

Re: Notice of intention to terminate our contract

We refer to the above matter as contained in your letter to us dated October 9th 2003.

The said notice was unjustified and unwarranted as the commendation and recognition of our contribution to the healthy promotion of Le Reve contradicts your allegations.

We have no explanation to offer, as our performance is the strength of our case.

Notwithstanding the motive behind the said notice, we wish to put you on notice that, any attempt on your part to jeopardize our livelihood, after we had spent much resource on developing the market with a view to enhancing our quality of life, as well as others who we have sponsored, will be met with a resort to legal redress.

A Kindly respond soonest to enable the Le Reve consultants and Directors to perform their function with peace of mind.

Yours sincerely,

sgd.
B Robin & Gina Van Buerle
Independent Senior Directors
Le Reve (M) Sdn. Bhd.

[68] It is the further contention of the defendant that the above response letter amounts to an admission of the allegation in the C show-cause letter. With respect, to my mind, the above letter is a strongly worded letter. Merely because the plaintiffs' letter contains the words:

We have no explanation to offer …

D

[69] It is no justification to conclude that the letter amounts to an admission of the defendant's allegation (made in the defendant's show-cause letter). These words (We have no explanation to offer …) cannot be considered in isolation. The E plaintiffs' letter must be examined in its entirety, taking into account the tenor of the letter. In my view it is far-fetched to regard the plaintiffs' response letter as an admission. The letter is far from being an admission. It is a letter expressing the plaintiffs' anger and indignation to the defendant's allegation. Any suggestion F of an admission is negated by such words as 'unjustified and unwarranted' and 'contradicts your allegations'. Such suggestion (of an admission) is also negated by the plaintiffs' threat of legal action if the defendant were to proceed to terminate the agreement.

G

[70] In conclusion I hold that the defendant had failed to discharge its legal burden of establishing that the plaintiffs had breached r. 3 of the Rules of Conduct. In other words it has failed to justify the unilateral termination of the agreement.

H **[71]** Having allowed the appeal on liability, I shall now move on to the issue of quantum.

[72] At the time of the termination of the agreement, the first plaintiff was 46 years in age whilst the second plaintiff was 42. I The plaintiffs were appointed in August 2000 and were terminated as Independent Consultants in October 2003. The defendant

concedes that the plaintiffs were committed in their work as Independent Consultants and it appreciates their contributions to the company.

[73] It is important to note that the agreement is not for a fixed period.

[74] The plaintiffs are seeking damages for loss of income of RM4,800 per month for a period of ten years. They calculated the total amount to be RM576,000. The plaintiffs are not clear in their submission as to why they are claiming for the loss of income for ten years.

[75] The defendant is not disputing seriously the claim of the loss of income of RM4,800 per month (this sum includes a sum of RM750 for the loss of the use of the Proton Wira car). But it seriously disputes the claim of loss of income for a period of ten years.

[76] It is to be recalled that under cl. 13(c) of the agreement the defendant may terminate the agreement for 'any reason' provided the plaintiffs are given one month's notice. By relying on this clause, the defendant submits that at best the plaintiffs are only entitled to a loss of income for a period of one month.

[77] Learned counsel for the defendant also refers to in *American International Assurance Company Ltd v. Koh Yen Bee* [2002] 4 CLJ 49. In this case, the agent alleged that the insurance company's termination of her agency was unlawful for failure to give reasonable notice and provide justification for her termination. The agent's contract between the agent and the insurance company provides:

> 26(b)
>
> Subject to sooner termination of the Agreement by the Company in accordance with Clause 27 hereof this Agreement may be terminated without giving any reason thereof.
>
> (b) By either party upon 15 day's notice in writing.

[78] Strictly in compliance with the above provision, the company in its notice of termination of the agency gave the agent 15 days' notice and did not assign any reason.

[79] The Court of Appeal, by majority, in allowing the appeal, notwithstanding cl. 26(b) of the agent's contract in that case, expressed the view, by way of *obiter dicta*, that the award of damages for the appellant's unlawful termination of the agreement should be arrived at by taking the average monthly income of the agent and multiply it by three months, being the period equivalent to the three months termination notice which the insurance company ought to have given.

[80] I am minded to apply the view as expressed by the Court of Appeal in *American International Assurance* to the present case. Of course, I am mindful of the fact that there the Court of Appeal was dealing with an insurance agency agreement whereas in the case before this court we are dealing with a MLM agency agreement. But I am of the opinion that in the interest of justice the principle applicable ought to be the same. Applying the principle as expressed in American International Assurance therefore the plaintiffs are entitled to damages for loss of income for three months that is RM14,400 (RM4,800 x 3).

[Appeal allowed with costs.]